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IN THE

Supreme Court of the United States

JOHN A. RAPANOS, et ux., et al.,
Petitioners,
v.
UNITED STATES,
Respondent.

JUNE CARABELL, et al.,
Petitioners,
v.
UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL MULTI HOUSING COUNCIL, NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, REAL ESTATE ROUNDTABLE, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AMERICAN RESORT DEVELOPMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Page

TABLE OF CONTENTS

INTERESTS OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. BY INTERPRETING ITS REGULATIONS TO CIRCUMVENT *SWANCC* AND REACH NON-JURISDICTIONAL FEATURES, THE CORPS CONTINUES TO IMPOSE UNAUTHORIZED AND ARBITRARY LIMITATIONS ON UPLAND DEVELOPMENT 6

A. The Supreme Court Has Determined That Federal Clean Water Act Jurisdiction Does Not Extend to Remote Hydrologic Features 7

B. The Corps Ignores the Limitations Placed on Its Authority by Continuing to Regulate Remote, Non-Jurisdictional Features 9

C. The Corps' Post-*SWANCC* Administration of the Section 404 Program Is Replete with Examples of Unlawful Assertions of Federal Jurisdiction 12

D. The Corps' Refusal to Respect the Bounds of Federal Jurisdiction Has a Substantial and Inequitable Impact on Development 15

II. EXTENDING FEDERAL JURISDICTION TO REMOTE, INTRASTATE, NON-ADJACENT FEATURES IS INCONGRUENT WITH ACHIEVING THE CLEAN WATER ACT'S GOALS 19

A. Congress Designed the Clean Water Act to Regulate Discharges That Impact the Integrity of Navigable Waters 19

B. Because Remote, Intrastate, Non-Adjacent Wetlands Lack the Capacity to Influence Navigable Waters, They Are Not Subject to Federal Jurisdiction 21

1. The Features at Issue Are Intrastate, Non-Adjacent Wetlands and Trenches Far Removed from Any Navigable Water 23

2. Remote, Non-Adjacent Features Lack the Capacity to Mitigate Flooding and Erosion in Navigable Waters 24

3. Remote, Non-Adjacent Features Lack the Capacity to Influence Water Quality of Navigable Waters 26

III. STATE REGULATION OF THESE REMOTE FEATURES IS NECESSARY DUE TO COMMERCE CLAUSE LIMITATIONS AND PRAGMATIC BECAUSE THE STATES ALREADY PROVIDE THIS REGULATION ... 27

CONCLUSION 30

Page

TABLE OF AUTHORITIES

Cases:

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 29

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United States v. Bd. of Trs. of Fla. Keys Cmty. Coll., 531 F. Supp. 267 (S.D. Fla. 1981) 17

United States v. Lopez, 514 U.S. 549 (1995) 28

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) .....*passim*

United States v. Weisman, 489 F. Supp. 1331 (M.D. Fla. 1980) 17

Statutes:

Clean Water Act, 33 U.S.C. § 1251, *et seq* 6

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33 U.S.C. § 1319 18

33 U.S.C. § 1344 6

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Baccarat Fremont Developers, San Francisco Dist. File No. 23205S (Oct. 25, 2001) (admin. appeal) 13

Frank Attanasio, Philadelphia Dist. File No. 199900072-46 (Mar. 5, 2004) (admin. appeal) 14

Corps Administrative Appeals, continued: Page

Irvine Nature Center, Baltimore Dist. File No. 02-63179-4 (Mar. 5, 2004) (admin. appeal) 14

Lands of David Fusco, New York Dist. File No. 2000-01007-YN (Dec. 5, 2003) (admin. appeal) 14

MolyCorp Inc. Property, Los Angeles Dist. File No. 200001678-AJS (Aug. 16, 2001) (admin. appeal) 13

Sunrise Office Park, Los Angeles Dist. File No. 2001-00379-RJD (Sept. 7, 2001) (admin. appeal) 13

The Biggers Property, Sacramento Dist. File No. 200275257 (Dec. 19, 2003) (admin. appeal) 14

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INTERESTS OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, the International Council of Shopping Centers, National Multi Housing Council, National Association of Industrial and Office Properties, Real Estate Roundtable, Associated General Contractors of America, American Resort Development Association, and National Association of Real Estate Investment Trusts, as *amici curiae*, respectfully submit this brief in support of Petitioners John A. Rapanos, *et ux.*, *et al.* and June Carabell, *et al.*[1]

Amici curiae are associations representing a wide variety of entities and individuals that own, develop, purchase, sell and improve land in the 50 states and the District of Columbia. Members of *amici* hold and control land as owners and managers of commercial, industrial, institutional and multi-family property; facilitate the purchase and sale of land as real estate brokers and agents; and work the land as developers, contractors, equipment operators and laborers. *Amici* have a substantial interest in the establishment of proper and predictable boundaries to the U.S. Army Corps of Engineers' wetlands jurisdiction under the Clean Water Act.

The International Council of Shopping Centers ("ICSC") is the premier global trade and professional association of the retail real estate industry. ICSC's more than 50,000 members include shopping center owners, developers, managers, marketing specialists, investors,

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[1] The *amici* have received the parties' written consent to submit this brief. Letters of consent have been filed with the Clerk of this Court. Pursuant to Rule 37.6 of this Court, no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amici* and their counsel has made a monetary contribution to its preparation and submission.

retailers and brokers. Shopping centers are America's marketplace, representing economic growth, environmental responsibility and community strength.

The National Multi Housing Council ("NMHC") represents the largest and most prominent apartment firms in the United States. NMHC members are engaged in all aspects of the apartment industry, including ownership, development, management and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research and promotes the desirability of apartment living.

The National Association of Industrial and Office Properties ("NAIOP") is the nation's leading trade association for developers, owners, investors and asset managers in industrial, office and mixed-use commercial real estate. Founded in 1967, NAIOP is comprised of more than 13,000 members in 50 North American chapters and provides networking opportunities, educational programs, research on trends and innovations, and legislative representation.

The Real Estate Roundtable ("Roundtable") brings together leaders of the nation's top public and privately-held real estate ownership, development, lending and management firms with the leaders of national real estate trade associations to address key national policy issues relating to real estate and the economy, including environmental and land use issues. Collectively, Roundtable members hold portfolios containing over five billion square feet of developed property valued at more than $450 billion. Participating trade associations represent more than one million people involved in virtually every aspect of the real estate business.

The Associated General Contractors of America ("AGC") is the oldest and largest national trade association in the construction industry. A non-profit corporation founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 32,000 firms in more than 98 chapters throughout the United States. AGC members include more than 7,000 of the nation's leading general contractors, 11,000 specialty contractors and 13,000 material suppliers and service providers to the construction industry. AGC members construct commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities and multi-family housing units; and they prepare sites and install the utilities necessary for housing development.

The American Resort Development Association ("ARDA") is the trade association representing the vacation ownership and resort development industries. Established in 1969 as the American Land Development Association, ARDA today has close to 1,000 members, ranging from privately held companies to major corporations in the United States and overseas. ARDA's diverse membership includes companies with interests in vacation ownership resorts, community development, fractional ownership, camp resorts, land development, second homes and resort communities.

The National Association of Real Estate Investment Trusts® ("NAREIT") is the representative voice for United States real estate investment trusts ("REITs") and publicly traded real estate companies worldwide. Members are REITs and other businesses that own, operate and finance income-producing real estate as well as those firms and individuals who advise, study and service these businesses.

SUMMARY OF ARGUMENT

Following enactment of the Clean Water Act ("CWA"), the U.S. Army Corps of Engineers ("Corps") dutifully applied its jurisdiction under Section 404 of the statute by regulating direct pollutant discharges into navigable waterways. Over time, without any additional congressional grant of authority and despite this Court's rulings in *Riverside Bayview* and *SWANCC*, the Corps has extended its jurisdiction further and further inland to encompass an expanding range of non-navigable "waters" and remote hydrologic features. This jurisdictional metamorphosis continued into 2001, when the Corps' interpretation of its delegated authority extended to virtually any water-bearing topographic feature. This Court was compelled to intervene. The Court explained that federal jurisdiction under the CWA is not limitless and that the Corps could not regulate non-navigable features lacking a significant nexus or inseparable tie to navigable waters.

Nonetheless, just five years later, the Corps has disregarded this Court's instructions and continues to assert jurisdiction over countless non-jurisdictional features, most often remote, intrastate, non-adjacent wetlands, manmade ditches, and other ephemeral seeps. This illegitimate expansion of federal jurisdiction is wreaking havoc on legitimate land development. The Corps has refused to issue regulations shedding light on its perception of the scope of proper federal jurisdiction. As a result, assertions of this jurisdiction vary widely among the 38 individual Corps district offices. Faced with this regulatory uncertainty, private and public property owners are left with little choice but to submit to the Corps'

extravagant claims of jurisdiction and endure the costly and protracted Section 404 permitting program.

In light of this Court's decisions over the scope of federal jurisdiction, the Corps' persistent regulation of remote wetlands and ephemeral trenches is wrong. These intrastate features are far removed from any jurisdictional waters, and they lack a significant nexus to navigable waterways. The very nature of these remote features renders them ecologically incapable of influencing distant navigable waters as the CWA intends and this Court requires. There is simply no basis in science and law for extending federal jurisdiction to these features.

Recognizing the constitutional constraints on its authority under the Commerce Clause, Congress expressly designed the CWA to preserve the States' longstanding authority over intrastate uses of land and water resources. Despite the Corps' ongoing encroachment into the state regulatory domain, the States can, and do, fully regulate the remote features at issue here. Such comprehensive state regulation renders the Corps' unauthorized assertions of federal jurisdiction unnecessary and duplicative. The Corps has trespassed into an area intended to remain within the province of the States, confounding otherwise effective state regulation and undermining legitimate upland development.

ARGUMENT

I. BY INTERPRETING ITS REGULATIONS TO CIRCUMVENT *SWANCC* AND REACH NON-JURISDICTIONAL FEATURES, THE CORPS CONTINUES TO IMPOSE UNAUTHORIZED AND ARBITRARY LIMITATIONS ON UPLAND DEVELOPMENT.

Congress enacted the Clean Water Act to address the impacts of pollutants on the navigable waters of the United States. 33 U.S.C. § 1251, *et seq.* The Act was designed to restore and maintain these waters by eliminating pollutant discharges into them. *Id.* § 1251. Since its enactment nearly 35 years ago, this ambitious statute has made significant strides toward achieving its goals. This progress has resulted from regulating the pollutant sources that discharge into navigable waters. But in the course of this progress, the regulated community has experienced escalating difficulty with the CWA's other regulatory mechanism, the Section 404 program for discharges of dredged or fill material.

In Section 404 of the CWA, Congress assigned to the U.S. Army Corps of Engineers the responsibility of regulating these discharges of dredged or fill material, which may degrade the water quality of navigable waterways and interfere with the conduct of interstate commerce. *Id.* § 1344. Originally, the Corps embraced its delegated authority by faithfully administering the Section 404 permitting program to control pollutant sources discharging directly into navigable waters. H. Michael Keller, *Waters of the United States (How Many Drops Does it Take)*, in *Water Quality & Wetlands* Paper No. 3, 3-11 (Rocky Mt. Min. L. Fdn. 2002). Over time, though, the Corps expanded its interpretation of the scope of federal jurisdiction under Section 404. *Id.* In addition

to regulating discharges directly into navigable waters, the Corps initiated a new policy of asserting jurisdiction over discharges into wetlands adjacent to these navigable waters. *Id.* This expansion led to considerable controversy among the Corps, the States, and governmental as well as private landowners. Continued disputes over federal regulation presented this Court with its first opportunity to review the scope of the Corps' jurisdiction to regulate discharges of pollutants into navigable waters.

A. The Supreme Court Has Determined That Federal Clean Water Act Jurisdiction Does Not Extend to Remote Hydrologic Features.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court acquiesced to the Corps' assertion of jurisdiction over adjacent wetlands.[2] The Court determined that expanding federal jurisdiction to reach wetlands adjacent to navigable waters is not "unreasonable" so long as the "adjacent wetlands [] are inseparably bound up with the 'waters' of the United States." *Id.* at 134, 135. The Court relied on the Corps' conclusion that adjacent wetlands "tend to drain into" abutting navigable waters and that they therefore may influence the water quality of those adjacent waters. *Id.* at 134. Thus, the Court concluded that the Corps'

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[2] The property at issue in *Riverside Bayview* contained a wetland "characterized by saturated soil conditions and wetland vegetation [that] extended . . . to Black Creek, a navigable waterway." *Riverside Bayview*, 474 U.S. at 131. Based on these hydrologic characteristics and the location of the disputed area, the Court found that the wetland was "adjacent to a navigable waterway" and therefore "is part of the 'waters of the United States' as defined by" Corps regulations. *Id.*

interpretation that "waters of the United States" extended to those adjacent wetlands was a "permissible" construction of the statute. *Id.* at 135.

Following *Riverside Bayview*, the Corps increasingly stretched its jurisdiction to reach non-navigable "waters" of the United States. By 1986, without any additional grant of authority from Congress, the Corps had repeatedly expanded its definition of "waters of the United States" to include not only navigable waters and adjacent wetlands but also: "all other waters such as intrastate . . . streams (including intermittent streams), mudflats, sandflats, [and] sloughs . . . the use, degradation or destruction of which could affect interstate or foreign commerce"; "all impoundments" of these waters; any "tributaries" of these waters; and any wetland adjacent to any of these non-navigable waters. *See* 33 C.F.R. § 328.3 (1986). Moreover, the Corps declared that this expansive definition of "waters of the United States" established the "jurisdictional limits of the authority of the [Corps] under the Clean Water Act." 33 C.F.R. § 328.1 (1986).

But the Corps did not limit its newly inflated jurisdiction to only the extensive number of faint, ephemeral rivulets trickling within each state; it also interpreted federal jurisdiction to reach isolated intrastate waters "[w]hich are or would be used as habitat by" migratory birds. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). When the Corps applied this "Migratory Bird Rule" to regulate several municipalities' activities, which would have impacted some abandoned sand and gravel pits that had filled with water, the municipalities challenged the rule, and this Court took the opportunity to curb the Corps' administrative sprawl.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 174 (2001) ("*SWANCC*"), this Court ruled that construing the definition of "waters of the United States" to encompass isolated, intrastate waters that serve as habitat for migratory birds "exceeds the authority granted to [the Corps] under § 404(a) of the CWA." The Court found that although CWA jurisdiction may extend beyond waters that are traditionally "navigable," such waters are only jurisdictional when they are "inseparably bound up with" or maintain a "significant nexus" to traditional navigable waters. *Id.* at 167, 172. "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id.* at 167. Nonetheless, because *Riverside Bayview* addressed only adjacent wetlands, its holding did not apply to the remote, intrastate, non-adjacent features at issue in *SWANCC*. *Id.* (quoting *Riverside Bayview*, 474 U.S. at 131-32, n.8). The Court then explained, that "[i]n order to rule for the [Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water." *Id.* at 168 (emphasis in original). The Court concluded that "the text of the statute will not allow this" and struck down the Migratory Bird Rule as an impermissible expansion of the Corps' jurisdiction to reach such remote features. *Id.*

B. The Corps Ignores the Limitations Placed on Its Authority by Continuing to Regulate Remote, Non-Jurisdictional Features.

If there was any lasting import to this Court's insistence on a significant nexus or an inseparable tie between navigable waters and non-navigable intrastate features, the regulated community has not experienced it.

Despite the guidance over Section 404 jurisdiction provided in *Riverside Bayview* and *SWANCC*, the Corps has disregarded these decisions.[3] Although the Corps recognizes that *SWANCC* "has affected the scope of federal jurisdiction under the CWA" and that the decision has "important implications for the scope of waters protected by the section 404 program, as well as implications for other Clean Water Act programs whose jurisdiction depends upon the meaning of 'navigable waters,'" the agency refuses to update its regulations to reflect the proper jurisdiction this Court delineated in *SWANCC*. *Hearing on Inconsistent Regulation of Wetlands and Other Waters: Before the Subcomm. on Water Res. and Env't, House Comm. on Transp. and Infrastructure*, 108th Cong. 4-5, 11 (2004) (statement of John Paul Woodley, Jr., Assistant Sec'y of the Army for Civil Works, & Benjamin H. Grumbles, Acting Assistant Adm'r for Water, EPA). Rather than adopting valid administrative regulations clarifying the proper scope of federal CWA jurisdiction under Section 404, the Corps issued a non-binding internal guidance document calling on its district offices to maintain the *status quo*. *See* Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United

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[3] The Corps is not alone in reading the "significant nexus" test out of *SWANCC*. Certain federal circuit and district courts have joined the Corps in circumventing the import of the decision. *See, e.g., United States v. Deaton*, 332 F.3d 698, 702, 707, 712 (4th Cir. 2003) (upholding assertion of federal jurisdiction over intrastate, non-navigable roadside ditches and nearby wetlands because "[a]ny pollutant or fill material" entering those remote, ephemeral features could possibly travel to and affect navigable waters seven miles away).

States," 69 Fed. Reg. 1991 app. A, at 1996-98, n.1 (Jan. 15, 2003) ("Joint Memorandum").

The Corps' non-binding guidance strips the substance from *SWANCC*. While cautioning the districts to avoid relying solely on the Migratory Bird Rule when expanding jurisdiction to isolated intrastate waters, the guidance openly advocates for the continued assertion of jurisdiction over the same suite of hydrologic features that were alleged to fall under the Corps' jurisdiction *prior* to *SWANCC*. *Id.* As support for preserving federal jurisdiction over virtually every remote, intrastate, non-adjacent hydrologic feature in the nation, the Corps falls back on *Riverside Bayview* and pretends *SWANCC* never happened. *Id.* at 1997, 1998. Although a unanimous Court in *Riverside Bayview* emphasized that its analysis applied only to wetlands adjacent to navigable waters – a fact which even the Corps has conceded – the Corps responded to *SWANCC* by hastily issuing its guidance emasculating the Court's latest assessment of the CWA and reconstruing the import of *Riverside Bayview*. This guidance claims that "the reasoning in *Riverside* . . . supports jurisdiction over wetlands adjacent to non-navigable waters that are tributaries to navigable waters" and authorizes the assertion of federal jurisdiction over "all interstate waters, and all tributaries to navigable or interstate waters, *upstream to the highest reaches of the tributary systems*, and over all wetlands adjacent to *any and all* of those waters." *Id.* at 1997; Memorandum from Gary S. Guzy, General Counsel, EPA, & Robert M. Andersen, Chief Counsel, U.S. Army Corps of Engineers, Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters 5, n.7, 6 (Jan. 19, 2001) (emphasis added).

In other words, federal jurisdiction remains virtually limitless, encompassing the most remote manmade ditch,

the most ephemeral swale, the most obscure depression. The Corps has not adapted its practices to square with this Court's jurisprudence, but rather, it has adapted this Court's jurisprudence to square with its practices.

C. The Corps' Post-*SWANCC* Administration of the Section 404 Program Is Replete with Examples of Unlawful Assertions of Federal Jurisdiction.

Post-*SWANCC* administrative appeals decisions from Corps district offices across the country illustrate the extent of the Corps' continued unauthorized regulation of remote, non-adjacent wetlands and distant ephemeral trenches. These appeals demonstrate that the Corps' regulation is not only excessive and irrational; it also regularly disrupts legitimate upland development and critical public infrastructure projects.[4]

Examples of such unlawful assertions of Corps jurisdiction abound. Shortly after *SWANCC* was decided,

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[4] The eight Corps division offices that oversee individual district offices within a particular region provide these administrative appeals decisions for public review on the divisions' websites. *See* Great Lakes & Ohio River Division - Table of Appeals, http://www.lrd.usace.army.mil/regulatory/appealprocess/; Mississippi Valley Division - Table of Appeals, http://www.mvd.usace.army.mil/Nwsinfo/MVD_Appeals/appeal.htm; North Atlantic Division - Table of Appeals, http://www.nad.usace.army.mil/appeals.htm; Northwestern Division - Table of Appeals, http://www.nwd.usace.army.mil/et/reg/appeals.asp; Pacific Ocean Division - Table of Appeals, http://www.pod.usace.army.mil/Regulatory/Regulatory.htm; South Atlantic Division - Table of Appeals, http://www.sad.usace.army.mil/regulatory/regulatory.htm; South Pacific Division - Table of Appeals, http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/index.htm; Southwestern Division - Table of Appeals, http://www.swd.usace.army.mil/../regulatoryappeals/index.htm.

the Corps' Los Angeles District extended federal jurisdiction to a "desert wash" simply because the property at issue was "at a higher elevation" than surrounding areas, and the District assumed that water from the wash "must flow down gradient and therefore must reach" an ephemeral drainage over 1,000 feet away, even though the District conceded that no morphological connection existed between the two features. MolyCorp Inc. Property, Los Angeles Dist. File No. 200001678-AJS at 7-9 (Aug. 16, 2001) (admin. appeal).[5]

The San Francisco District attempted to assert jurisdiction over wetlands separated from drainage channels by 250 feet of manmade uplands because the wetlands were within "reasonable proximity" of the channels to establish adjacency. Baccarat Fremont Developers, San Francisco Dist. File No. 23205S at 5 (Oct. 25, 2001) (admin. appeal). The District reasoned that site topography indicated that the wetlands *could* drain into the channels during storm events *if* the uplands had not been there to prevent such drainage. *Id.*

The Sacramento District contended that federal jurisdiction reached a small wetland area in Colorado that during large storm events periodically flowed offsite through a vegetated drainage until it reached a golf course

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[5] The same District claimed jurisdiction over another desert wash, which occasionally emptied into a manmade water retention basin, which was "drained by a 60 foot long, 6 inch diameter underground culvert," which connected to a channel that meandered through residential areas and became "indistinct at several locations ... where [it] follows or crosses paved surfaces." The District alleged that "[t]hese road crossings act as conduits of the water and maintain the tributary connection." Sunrise Office Park, Los Angeles Dist. File No. 2001-00379-RJD at 3 (Sept. 7, 2001) (admin. appeal).

fairway, crossed the grass fairway as undefined sheet flow, entered a 6 inch pipe, traveled underground for several hundred feet, then drained into a manmade roadside ditch, which meandered for over one mile before reaching a river. The Biggers Property, Sacramento Dist. File No. 200275257 at 3-4 (Dec. 19, 2003) (admin. appeal).[6]

Based on its review of a 1949 U.S. Geological Survey map, the New York District claimed jurisdiction over wetlands even though it admitted during a site visit that there was no identifiable hydrologic connection between those wetlands and unrelated onsite tributaries. Lands of David Fusco, New York Dist. File No. 2000-01007-YN at 2-4 (Dec. 5, 2003) (admin. appeal). The District nonetheless alleged that jurisdiction was proper because, according to the map, the wetlands "'*appear to be* part of a wetland complex that *was associated* with an unnamed tributary to [a named tributary]' that was 'located in the *proximity* of these wetlands.'" *Id.* at 3 (emphasis in the original).[7]

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[6] Similarly, the Baltimore District attempted to assert jurisdiction over an "ephemeral channel" that drained offsite until it reached an upland agricultural area and disappeared; the ephemeral channel was "separated from [any] jurisdictional areas by at least 600 feet of non-jurisdictional areas." Irvine Nature Center, Baltimore Dist. File No. 02-63179-4 at 1-2 (Mar. 5, 2004) (admin. appeal); *see also* Frank Attanasio, Philadelphia Dist. File No. 199900072-46 at 9 (Mar. 5, 2004) (admin. appeal) (asserting jurisdiction over wetland based on alleged historic hydrologic connection that no longer existed but explaining that "[g]iven the heavy usage of the site by children for recreational purposes, it is entirely reasonable the ditch may have been disturbed beyond recognition").

[7] Likewise, the Los Angeles District attempted to assert jurisdiction over a desert wash that, prior to 1952, may have had a hydrologic connection to another wash. Although the District conceded that any connection "disappeared some time after 1952,"

(Continued ...)

D. The Corps' Refusal to Respect the Bounds of Federal Jurisdiction Has a Substantial and Inequitable Impact on Development.

As the above examples demonstrate, the Corps continues to exercise its jurisdiction over remote, non-navigable wetlands and distant, ephemeral trenches, usually with inexplicable and inconsistent results. The unpredictability currently tainting the Corps' jurisdictional determinations has substantial and inequitable impacts on property development and critical infrastructure improvements, which are already subject to the full panoply of state and local regulation.

Negotiating the Section 404 permitting program involves a major logistical undertaking for property owners. It requires immense expenditures of both time and capital resources. As one study recently explained, it takes applicants an average of 788 days to obtain an individual Section 404 permit. D. Sunding & D. Zilberman, *The Economics of Environmental Regulation by Licensing*, 42 Nat. Resources J. 59, 74-76 (2002). This protracted process carries an average price tag of over $271,000, not including the opportunity costs and delay-related costs accrued during the two years required to complete the process. *Id.* Nor does this average cost account for the increased financial burdens accompanying the growing regulatory uncertainty that now typifies the

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(Continued ...)
and the administrative record contained no evidence that any connection ever existed, the District deemed the wash jurisdictional based on the alleged "historical tributary connection." Valley Vista Property, Los Angeles Dist. File No. 2002-001321-SMD at 2-4 (Jan. 31, 2003) (admin. appeal).

Corps' jurisdictional determinations. *See id.* at 82. Such uncertainty requires owners to "carry capital and bear labor and other operating expenses for longer periods of time." *Id.* Consequently, they incur increased borrowing costs due to the need for additional capital and higher interest rates. *Id.*

Moreover, in the absence of suitable agency guidance defining the proper scope of the Corps' jurisdiction over non-navigable, non-adjacent wetlands and manmade trenches, the 38 Corps districts implementing Section 404 permitting have been forced to interpret the pre-*SWANCC* regulations to determine whether CWA jurisdiction extends to these remote features. *See* U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297, 3-4, 17-25 (Feb. 2004). As a result, while the districts generally continue to employ the same processes and data sources as they did prior to *SWANCC* to make jurisdictional determinations ("JDs"), their interpretations of the scope of federal jurisdiction over non-navigable, non-adjacent wetlands and related ephemeral drainages vary widely, resulting in a nationwide patchwork of contradictory, often overreaching Corps practices and assertions of federal jurisdiction. *See id.* at 17-25 (discussing the districts' varying JD practices based on hydrologic connections, proximity to navigable waters, upland barriers, tributaries, and ditches); *see also* U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction*, GAO-05-870, 14-15 (Sept. 2005) (finding similar procedures among districts for conducting JDs, but noting the differing policies used for determining jurisdiction).

Given the absurdity of trying to apply the Corps' opaque post-*SWANCC* guidance, it is hardly surprising that such wide-ranging inconsistency has developed among the district offices. However, the effects of the Corps' confusion and of the resulting inconsistent practices extend far beyond the district offices.[8] It is the property owner and project manager that bear the burden of the Corps' illegitimate practices because it is impossible to predict with any reasonableness whether and to what degree a particular district will extend jurisdiction over any remote, ephemeral features that could be impacted by onsite activity.[9] The Corps' informal guidance further exacerbates the confusion by instructing each district office to conform JDs to subsequent federal court

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[8] The muddled application of CWA jurisdiction among the district offices has produced a similarly muddled application of CWA jurisdiction among the federal district courts and circuit courts. *See* Joint Memorandum, *supra* at 1996-98 (summarizing the many inconsistencies among the lower federal courts). Apparently taking their cue from the Corps' distorted rendition of this Court's direction in *Riverside Bayview* and *SWANCC*, many – but not all – of the federal courts have disregarded the jurisdictional boundaries articulated in those decisions. *See* Petitioners' Carabell *et al.* Pet. for Cert. at 8-13 (surveying various federal court opinions addressing the Corps' jurisdiction).

[9] Courts have found that, in addition to landowners, contractors and consultants are also liable for discharging pollutants without a permit. *See United States v. Bd. of Trs. of Fla. Keys Comm. Coll.*, 531 F. Supp. 267, 274 (S.D. Fla. 1981) (finding both the landowner *and* the contractor liable, where the contractor was responsible for discharge but the owner was responsible for obtaining CWA permits); *see also United States v. Weisman*, 489 F. Supp. 1331, 1333-34 (M.D. Fla. 1980) (holding liable a consultant who designed a road project, applied for a Section 404 permit, and communicated with the Corps about the project but did not order discharge activity and was not present when the discharge occurred).

decisions concerning the scope of jurisdiction within the respective district. Joint Memorandum, *supra* at 1998. This policy, when applied to the districts' already divergent interpretations of their jurisdiction over non-navigable, non-adjacent features, has created a self-sustaining cycle of JDs made by a district, leading to federal court review of the asserted jurisdiction, leading to revised interpretations of CWA jurisdiction within the district. *See id.* at 1996-98 (detailing the many inconsistent judicial interpretations of federal jurisdiction over remote features).

Without the benefit of consistent and proper JDs for true interstate, adjacent features, citizens must incur the additional costs of the Section 404 program, regardless of whether there are actually jurisdictional features located on a development site or not. In light of the grueling consequences *amici* firms and other citizens face if they unsuccessfully attempt to divine a district office's rendition of federal jurisdiction, they are left with little choice but to submit to the Section 404 process and incur the delays and high costs (not to mention the uncertainty) that accompany it.[10]

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[10] The Clean Water Act carries strict civil liability provisions, under which violations are punishable with daily fines topping $32,500 each. 33 U.S.C. § 1319(d); Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 7125 (Feb. 13, 2004). The statute also imposes severe criminal penalties for violations, including prison terms of one to six years and fines of up to $100,000 per day. 33 U.S.C. § 1319(c).

II. EXTENDING FEDERAL JURISDICTION TO REMOTE, INTRASTATE, NON-ADJACENT FEATURES IS INCONGRUENT WITH ACHIEVING THE CLEAN WATER ACT'S GOALS.

Despite the Corps' continued assertion of federal jurisdiction over remote, intrastate, non-adjacent wetlands and drainages following *SWANCC*, these features do not fall within the ambit of federal authority. Manmade ephemeral trenches are neither wetlands nor waters. And while the wetland features may satisfy the regulatory criteria for "wetlands" as defined by the Corps, they lack the capacity to influence the integrity of navigable waters, even when connected to an ephemeral drainage. As a result, these features do not factor into the legislative design of the CWA and are not subject to federal regulation.

A. Congress Designed the Clean Water Act to Regulate Discharges That Impact the Integrity of Navigable Waters.

Congress designed the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the legislature set a national goal of eliminating "the discharge of pollutants into the navigable waters." *Id.* § 1251(a)(1). Significantly, Congress also expressed the concomitant goal "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." *Id.* § 1251(b). These two goals, together with the Section 404 permitting program for the "discharge of dredged or fill material into the navigable waters," provide the framework on which this Court relies to evaluate the

proper scope of federal jurisdiction over non-navigable hydrologic features. *See, e.g., Riverside Bayview*, 474 U.S. at 132-33 (evaluating the Corps' authority over adjacent wetlands "in light of the language, policies, and legislative history of the Act").

Applying this framework, this Court recognizes that the federal government's Section 404 authority encompasses truly "navigable waters," and that this authority derives from Congress' "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *See SWANCC*, 531 U.S. at 172. The Court also found that this analytical framework justifies extending the Corps' authority to certain wetlands adjacent to navigable waters if these features "play a key role in protecting and enhancing water quality" and are therefore "inseparably bound up" with the navigable waterways that the CWA aims to protect. *Riverside Bayview*, 474 U.S. at 133-35. Conversely, the Corps was prohibited from stretching its reach to regulate intrastate, non-navigable, non-adjacent features inhabited by migratory birds because these features lack a "significant nexus" to, or are not "inseparably bound up with," navigable waters. *See SWANCC*, 531 U.S. at 167-68.

As observed in *Riverside Bayview* and *SWANCC*, adjacency may engender a significant nexus between non-navigable features and navigable waters because it may allow the features to have an external, offsite influence by functioning "as integral parts of the aquatic environment." *Id.*; *Riverside Bayview*, 474 U.S. at 134, 135. Among the external effects the Court highlighted as integral to the aquatic environment were the capacity "to filter and purify water" discharging into navigable waters and the capacity "to slow the flow of surface runoff . . . and thus prevent

flooding and erosion." *Riverside Bayview*, 474 U.S. at 134. By performing these ecological functions, certain adjacent wetlands may contribute to achieving the legislative goal of preserving and maintaining the integrity of navigable waters.

B. Because Remote, Intrastate, Non-Adjacent Wetlands Lack the Capacity to Influence Navigable Waters, They Are Not Subject to Federal Jurisdiction.

Not every wetland is an adjacent wetland. In fact, a great number of wetlands are not. Based solely on the ecological functions highlighted in *Riverside Bayview*, adjacent wetlands may exhibit a significant nexus with navigable waters, which could confer federal jurisdiction over the features. Yet, adjacent wetlands are but one of many distinct classes of hydrologic features that fall under the rubric of "wetlands."[11] This legal term simply signifies that a feature exhibits the three morphological attributes that separate wetlands from uplands—hydrology, hydric soils, and hydrophytic vegetation. 33 C.F.R. § 328.3(b); William J. Mitsch & James G. Gosselink, *Wetlands* 584-87 (3d ed. 2000). Consequently, the only absolute among the various classes of wetlands is that they all exhibit these three criteria. But these criteria merely describe what a wetland *is*, not what a wetland *does*.

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[11] The Corps defines wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b).

Wetland physiology, the functional aspect of wetlands, is determined by a combination of external factors. Theda Braddock, *Wetlands: An Introduction to Ecology, the Law, and Permitting* 12 (1995). The scientific community has "increasingly recognized that the factors controlling the existence of a wetland as well as its functions and values are largely determined by landscape characteristics and the wetland's position in the landscape." *Id.* at 24; *see also* Mark S. Dennison & James F. Berry, *Wetlands: Guide to Science, Law, and Technology* 61-65 (1993) (explaining that wetland function depends on a variety of factors, including wetland type, location, and hydrology). These external factors interact in various manners, creating different classes of wetlands with unique functional capacities. *See generally* Dennison & Berry, *supra,* at 74-145 (describing different characteristics and functions of fourteen separate wetland classes). Because wetland function correlates directly to the effects of each wetland on the outside environment, and each wetland class represents a unique functional scheme, it is understandable that the different classes of wetlands influence the outside environment in different ways. *See* Braddock, *supra*, at 12.

As this Court recognized in *Riverside Bayview* and *SWANCC*, it is this external influence, specifically the influence on navigable waters, that confers federal jurisdiction over non-navigable hydrologic features. *Riverside Bayview*, 474 U.S. at 134-35; *SWANCC*, 531 U.S. at 167-68. Due to their external influence, some of these features may contribute to achieving Congress' goal of restoring and maintaining the chemical, physical, and biological integrity of navigable waters. *Riverside Bayview*, 474 U.S. at 134-35. But features lacking the functional capacity to influence the integrity of navigable

waters are incapable of furthering Congress' goal. *See SWANCC*, 531 U.S. at 167-68.

1. *The Features at Issue Are Intrastate, Non-Adjacent Wetlands and Trenches Far Removed from Any Navigable Water.*

The intrastate, remote wetlands and ephemeral trenches at issue here are not adjacent to navigable waters. Nor are they even close to any navigable waters. These features do not perform the functions that the Corps so often relies on to justify its expansion of federal jurisdiction over other non-navigable features. Unlike wetlands adjacent to navigable waters, these wetlands are normally groundwater and direct precipitation-dependent. *See* Dennison & Berry, *supra* at 87-123 (distinguishing hydrologic sources for classes of adjacent wetlands from hydrologic sources for classes of non-adjacent wetlands). Their hydrology is primarily a product of proximity to the underlying water table and regional climate, rather than as a receiving body for up-gradient surface water discharges, floodwater spillover, or backwater flooding. *Id.*

The most that may be said of these remote, intrastate wetlands and ephemeral trenches is that they possibly bear a tangential affiliation to some distant navigable waters. However, this affiliation arises only if any water happens to seep out of these wetlands, which generally lack fixed outlets, traverse a labyrinth of manmade trenches or other ephemeral and intermittent drainages, which are normally dry, and eventually find its way to a navigable water. Neither Congress nor any landowner would have conceived that such property is somehow federalized.

While admittedly, if there is in fact a faint "connection" between the distant wetlands and an offsite

manmade trench or other ephemeral seep, as Respondents claim, the features could provide some minor, localized ecological function. *See* Paul D. Cylinder, *et al.*, *Wetlands, Streams, and Other Waters* 10 (2004) (explaining that ecological function of down gradient drainages "is highly dependent" on external inputs). But such function, even in the aggregate, hardly occurs with the frequency, duration, or scale required to maintain a "significant nexus" or inseparable tie with distant navigable waters. *See Riverside Bayview*, 474 U.S. at 133-35; *SWANCC*, 531 U.S. at 167-68. Put simply, any functions of these solitary, intrastate features over which the Corps claims to maintain jurisdiction are far too remote, localized, and infrequent to fall within the federal government's authority.

2. *Remote, Non-Adjacent Features Lack the Capacity to Mitigate Flooding and Erosion in Navigable Waters.*

An examination of the scientific evidence indicates that, consistent with this Court's observation in *Riverside Bayview*, certain adjacent wetlands may help to reduce the impacts of flooding and erosion in abutting navigable waters by receiving floodwater overflow from these waters and intercepting and retaining surface water discharges before they enter navigable waters. Braddock, *supra*, at 13; Dennison & Berry, *supra* at 63. In this way, adjacent wetlands can mitigate the damage a flood causes. This function is largely a product of their position in the landscape on floodplains and in bottomlands, which allows those wetlands to "store and attenuate flood waters when streams or rivers overflow their banks." *See* Braddock, *supra* at 13. By storing floodwater overflow and surface water discharges, these wetlands may also dissipate the energy of floods and decrease the impacts of

downstream bank erosion in the flooding navigable waterway. Dennison & Berry, *supra* at 63-65. But *Carabell* and *Rapanos* bear no relationship to such circumstances.

From an ecological perspective, the remote wetlands and ephemeral trenches at issue here are in no way analogous to the wetlands adjacent to navigable waters in *Riverside Bayview*. Remote, intrastate wetlands play an extremely minor and localized role in flood mitigation, if they play any role at all. *See* Braddock, *supra*, at 13 (attributing the function of flood attenuation to floodplain and bottomland features). Because these non-adjacent features are not located in a floodplain of any sort, they are incapable of reducing flooding by receiving water that overtops the banks of rivers and streams, the primary mechanism of flood abatement. Dennis W. Magee, *A Primer on Wetland Ecology*, in *Wetlands Law and Policy* 44-45, 47-48 (2005); Mitsch & Gosselink, *supra*, at 584-87. Any capacity to reduce flooding in navigable waters derives from their capacity "to intercept storm runoff and to store storm waters, thereby changing sharp runoff peaks to slower discharges over longer periods of time." Mitsch & Gosselink, *supra*, at 584.

Despite the Corps' claim to the contrary, there is no indication that these wetlands perform these functions in any consequential way, particularly when their only external outlet is through manmade trenches and other ephemeral seeps. *See id.* at 126-33 (noting while some wetlands act as "water flow regulators for downstream rivers," others "have surface outflows that develop only when their water stages exceed a critical level"). As noted, these wetlands are often groundwater-driven and direct precipitation-dependent systems. Many of these features never, or only rarely, contain aboveground water

and their only external outlet is an ephemeral, manmade trench or drainage—hardly indicative of being inundated by or storing significant amounts of surface water runoff or storm water flow. Robert J. Pierce, Ph.D., PWS, CWD, Wetland Science Applications, Inc., Technical Principles Related To Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act 35-40, 60-61 (2003), http://www. wetlandtraining.com/BobRept.pdf.

The location of adjacent wetlands within floodplains and bottomlands also allows them to serve as buffers that separate surface runoff sources from navigable waterways. *See* Dennison & Berry, *supra*, at 65. By acting as buffers, adjacent wetlands may decrease runoff velocity of surface water flow before it is discharged. *Id.* This function dissipates energy and reduces erosion. *Id.* at 63-65, 124. But remote, non-adjacent wetlands are not located in these areas and have an extremely limited capacity to act as buffers or to store surface water. *See id.* at 90-100, 123-25. As such, they have a limited capacity to reduce offsite erosion and resulting downstream siltation.

3. *Remote, Non-Adjacent Features Lack the Capacity to Influence Water Quality of Navigable Waters.*

Scientific studies also indicate, as this Court recognized in *Riverside Bayview*, that the particular functional scheme of adjacent wetlands may perform ecological functions that influence water quality in abutting navigable waters. *See Riverside Bayview*, 474 U.S. at 134-35. Studies have found that, under certain conditions, wetlands adjacent to navigable waters have the "capability to cleanse water through biogeochemical transformation of various pollutants, particularly nutrients." Braddock, *supra*, at 12. Due to their topographic position on floodplains and bottomlands and

at the fringes of lakes, these wetlands serve as buffers to neighboring navigable waters and help to reduce the pollutant concentration of flows entering those waters. Magee, *supra* at 40, 44-45, 47-48. Thus, certain wetlands in these locations may influence adjacent navigable waters by discharging water of a "higher quality" than the water that originally entered the wetland. *Id.* at 40-41. Again, *Carabell* and *Rapanos* bear no relationship to such circumstances.

The remote wetlands and ephemeral trenches at issue here do not normally provide this function because they are not adjacent to any navigable water. Nor do they serve as buffers to discharging surface waters. These features are simply too far removed to influence the water quality of navigable waters. Pierce, *supra* at 35-40, 60-61. In addition to their remote, non-adjacent location, the filtration capacity of these wetlands is also hampered by their lack of surface water storage capacity. Along with increasing the ability to mitigate downstream flooding, "a wetland's ability to store surface water is strongly correlated with its capacity to modify water quality by retaining, trapping, and transforming sediment and contaminants." Magee, *supra* at 43. Since remote groundwater-driven and precipitation-dependent wetlands have little surface water storage capacity, the ability of these features to influence water quality is even further limited. *See generally* Pierce, *supra* at 35-40, 60-61.

III. STATE REGULATION OF THESE REMOTE FEATURES IS NECESSARY DUE TO COMMERCE CLAUSE LIMITATIONS AND PRAGMATIC BECAUSE THE STATES ALREADY PROVIDE THIS REGULATION.

Because remote, intrastate, non-navigable, non-adjacent wetlands and ephemeral manmade trenches are

generally incapable of influencing the integrity of navigable waters, the Constitution of the United States dictates that federal regulation of these features must yield to state regulation. Otherwise, the Corps' reach is virtually infinite.

It is beyond dispute that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *SWANCC*, 531 U.S. at 173. As this Court explained, there are but three "categories of activity that Congress may regulate under its commerce power": 1) the channels of interstate commerce (*i.e.*, traditional navigable waters); 2) the instrumentalities of interstate commerce, or persons and things in interstate commerce; and 3) activities that "substantially affect" interstate commerce. *SWANCC*, 531 U.S. at 192-93 (Stevens, J. dissenting) (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)). Federal regulation of remote, intrastate, non-navigable wetlands and ephemeral trenches is analyzed under the third category. *See id.* at 193 (analyzing in dissent the Migratory Bird Rule under the substantial effects test).

As discussed at length above, the natural and manmade features at issue here do not influence the integrity of navigable waters. The ecological incapacity of these intrastate wetlands and manmade trenches to affect the channels of interstate commerce indicates that they are also incapable, even in the aggregate, of substantially affecting such commerce. Consequently, these distant and faint features cannot be subject to federal jurisdiction.

Congress recognized the constitutional constraints on exercising federal authority over remote, intrastate, non-navigable features. In drafting the Clean Water Act, Congress expressly preserved the traditional authority of

the States to control intrastate uses of land and water resources and maintained "the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). As explained in *SWANCC*, inflating the scope of federal authority to reach property that has only limited and localized ecological functions, if any, violates the express legislative intent of the CWA and marks "a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. Congress intended the States to regulate these remote features, and the States have honored this intention.

The States can, and do, regulate the features at issue here. In fact, already 47 States have adopted statutory or regulatory programs that offer protection for intrastate wetlands and waters. *See* Jeanne M. Christie, State Wetland Programs (2005), http://www.aswm.org/swp/statemainpage9.htm; Paul D. Cylinder, *et al.*, *supra* at 101-13 (describing the water resource programs in each state).[12] These programs have been remarkably successful at conserving remote, intrastate freshwater wetlands, coastal wetlands, and ephemeral features not subject to the Corps' jurisdiction. *See id.* at 99-100, 116-23 (detailing accomplishments of programs in California, Florida, Massachusetts, Michigan, New Jersey, and Washington); *see also Palazzolo v. Rhode Island*, 533 U.S. 606-(2001) (discussing wetland protections under Rhode Island law in a takings challenge).

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[12] In the interest of brevity, the state statutory and regulatory programs that offer protection of these intrastate features have not been individually listed here. The cited sources describe each state's programs in detail.

Such comprehensive state regulation renders the Corps' illegitimate assertions of federal jurisdiction unnecessary and duplicative. The Corps' intrusive practices only serve to confound effective state programs, not to mention legitimate land development and public infrastructure improvements already subject to rigorous state and local environmental and land use regulation.

CONCLUSION

The *amici* International Council of Shopping Centers, *et al.* respectfully request that this Court reverse the Sixth Circuit's rulings in *Rapanos* and *Carabell* upholding the extension of federal Clean Water Act jurisdiction over non-adjacent, non-navigable wetlands and drainages.

Respectfully submitted,

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